

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2001-209-C - ORDER NO. 2004-257  
MAY 14, 2004

IN RE: Application of BellSouth Telecommunications, ) ORDER  
Inc. for a Certificate of Public Convenience and )  
Necessity to Provide In-Region InterLATA )  
Services Pursuant to Section 271 of the )  
Telecommunications Act of 1996. )

**I. INTRODUCTION**

This matter comes before the Public Service Commission of South Carolina (the Commission) on a Motion for Reconsideration of a portion of Order No. 2004-100 (the Review Order) filed by BellSouth Telecommunications, Inc. (BellSouth). AT&T Communications of the Southern States, LLC (AT&T) filed a response to BellSouth's Motion.

BellSouth moves this Commission to reconsider Section D (Measurement of Payment in IPP Plan) and Paragraph 5 (page 11) of the Review Order. BellSouth alleges that these portions of the Review Order would be reversed on appeal because (1) they are not supported by the evidence of record of this proceeding; and (2) they arbitrarily fail to follow established Commission precedent. BellSouth therefore requests that the Commission enter an Order on Reconsideration that vacates these portions of the Review Order and finds that payments under the IPP (Incentive Payment Plan) should continue to be calculated based on the edge of the confidence interval, consistent (in BellSouth's

opinion) with the evidence in this proceeding and in compliance with prior Commission Orders.

AT&T's response to the Motion may be summarized by stating that AT&T argues that the decision in question was supported by substantial evidence, and that the Commission did not arbitrarily fail to follow its established precedent.

Because of the reasoning stated below, we deny the Motion.

## **II. PROCEDURAL HISTORY**

The Federal Telecommunications Act of 1996 (the Act) allowed BellSouth to begin originating interLATA toll calls upon a finding by the Federal Communications Commission (FCC) that BellSouth met the requirements set forth in Section 271 of the Act. Before the FCC could make this determination, however, the FCC was required to consult with the Public Service Commission of South Carolina in order to verify BellSouth's compliance with these requirements. The Commission held extensive hearings on this matter, and, ultimately, entered Order No. 2002-77, which, among other things, approved BellSouth's application for Section 271 authority to provide interLATA services in South Carolina.

Further in Order No. 2002-77, the Commission adopted BellSouth's proposed IPP with certain modifications. At that time, the Commission also approved BellSouth's proposal that payments under the IPP should be calculated from the edge of the confidence level. The Commission expressly held, however, that BellSouth and the Commission would reassess the payment calculation during the first six-month review of the plan. Specifically, the assessment would focus on whether the payment should be

calculated from the estimator (mean) as opposed to the edge of the confidence level.

Although the Commission first ruled that a paper hearing would be held for the review (Order No. 2003-235), this was subsequently vacated (Order No. 2003-449). The Commission also issued Order No. 2003-502, which held, among other things, that “the testimony that already has been filed in this docket will form the basis for the hearing and no other prefiled testimony will be accepted.” Ultimately, a hearing was held on August 21, 2003, during which evidence was presented on this issue. The testimony included conclusions by BellSouth witness Dr. William Taylor and Staff witness Dr. James Spearman that the payment should continue to be measured from the edge of the confidence interval, not from the mean. However, also included in the testimony of Dr. Taylor was a discussion of the testimony of Robert M. Bell, an AT&T witness from the prior hearing in the Docket. Bell had advocated measurement from the mean.

Subsequently, the review Order, Order No. 2004-100, was issued, which, based on the testimony of AT&T witness Bell, held that the measurement of the payment should be from the mean, instead of from the edge of the confidence level. BellSouth’s Motion for Reconsideration was then filed, as was AT&T’s response.

### **III. DISCUSSION**

BellSouth’s first ground alleges that this Commission’s findings are not supported by any evidence in this proceeding, and that, therefore, a reviewing court would reverse the Review Order. Bell lists several cases in which the Commission Orders were reversed, including, notably, a BellSouth case. BellSouth states that the only testimony in the review proceeding addressing the calculation of penalties was the testimonies of Drs.

Taylor and Spearman. Both witnesses stated that, in their opinion, in calculating penalties under the IPP, it is important to measure from the edge of the confidence interval and inappropriate to measure from the mean.

In addition, BellSouth argues that a reviewing Court would reverse the Review Order because it “arbitrarily fails to follow established Commission precedent” when it failed to rule that the measurement of the IPP penalty should be made from the edge of the confidence interval. BellSouth argues that the Commission had already heard and rejected the testimony of AT&T witness Bell. Further, since the Commission found no backsliding by BellSouth in the Review Order, BellSouth states that the Review Order’s reversal of established precedent was arbitrary, since it is neither necessary nor appropriate to further the purpose of the IPP. Lastly, BellSouth notes that the Commission has “acknowledg[ed] that BellSouth maintains the right to modify the IPP at its own discretion, subject to Commission approval, and, conversely, to consent to any revisions to the IPP proposed by this Commission or CLECs prior to the revisions entering into effect.” BellSouth alleges that it has not consented to revising the method by which payments under the IPP are calculated.

AT&T’s response to the BellSouth Motion takes a different view of the matter. First, AT&T argues that the testimony that formed the basis for the Commission’s decision is indisputably record evidence in this Docket, and was properly relied upon by this Commission in making its decision. As pointed out by AT&T, the testimony of Robert M. Bell was properly before this Commission at the time it made its decision, even though the Bell testimony had been presented in a prior hearing in this Docket.

AT&T references Order No. 2003-502 in this Docket in which we held that “testimony that has already been filed in this docket will form the basis for the hearing.”

AT&T further points out that rulings of the Commission are upheld on appeal as long as there is substantial evidence in the record to support the Commission’s decision.

Porter v. South Carolina Public Service Commission, 333 S.C. 12, 507 S.E. 2d 328

(1998) notes that substantial evidence is “relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency’s action.” AT&T notes, in the present case, that a reasonable mind could choose either BellSouth’s position or AT&T’s position. In addition, the Porter case held that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency’s finding.” AT&T argues that that is exactly what happened in the present matter, the Commission had before it the two sets of testimony, so that the Commission could have drawn either conclusion, based on substantial evidence.

Also, with regard to the question of the Commission “arbitrarily failing to follow precedent,” AT&T points out that, while it is true that the Commission cannot act arbitrarily in failing to follow established precedent, it is also true that the Commission cannot use a previously adopted policy as the sole basis for an Order. The Commission must set forth findings detailed enough for a reviewing court to determine whether the Commission’s findings are supported by the record evidence. See Hamm v. South Carolina Public Service Commission, 309 S.C. 282, 422 S.E. 2d 110 (1992). AT&T further argues that the Commission must support its conclusions with record evidence,

not mere citation to precedent. However, AT&T further states that deciding to rely upon one party's testimony instead of another's is not arbitrary, nor does it represent use of a "previously adopted policy" lacking in record evidence.

Finally, AT&T argues that if BellSouth must "consent to any revisions to the IPP proposed by the Commission" then it follows that the Commission can only issue Orders with which BellSouth agrees, and there is no need for BellSouth to have filed its Motion for Reconsideration.

We have examined the reasoning furnished by both BellSouth and AT&T, and we must conclude that AT&T's stated legal positions are correct and must prevail. We hold that the Robert M. Bell testimony upon which we based our conclusion in the Review Order was certainly properly before us, and was therefore properly used to support our conclusion. As pointed out by AT&T, our holding in Order No. 2003-502 was that testimony already filed in the Docket would form the basis for the review hearing. Clearly, the Robert Bell testimony fit into the category of testimony already filed in the Docket. In addition, the Robert Bell testimony was summarized in the testimony of Dr. Taylor, which was presented in the review hearing. TR. at 27-28. Accordingly, the Robert Bell testimony was not foreign to the review hearing, but was clearly before this Commission at the review proceeding, and therefore available for use in supporting our position in the Review Order. We believe that the Robert Bell testimony constituted substantial evidence of record to support our conclusion that the penalty in the IPP should be measured from the mean, and not the edge of the confidence interval.

We also agree with AT&T that BellSouth mischaracterizes our action as “arbitrarily failing to follow precedent.” Deciding to rely upon one party’s testimony instead of another’s is not an arbitrary action. We undeniably have the ability to choose between two competing positions as expressed in the record testimony. Further, if this Commission adopted the BellSouth position, we would never be able to grant a Petition for Reconsideration, because each grant would be breaking from established “precedent.” We also agree with AT&T that if we were to adopt BellSouth’s interpretation of “arbitrary,” every ruling of the Commission on a particular issue would be set in stone, and subject to future modification or reexamination. We would also point out that the methodology for measuring the IPP payment was up for reconsideration in any event, as per our holding in Order No. 2002-77 at 120. Therefore, this Commission was fully within its rights to examine a possible change in methodologies, and, if appropriate in light of the evidence, to change that methodology. No arbitrariness was present in any of this Commission’s proceedings or holdings.

Finally, although we acknowledge the language in Order No. 2002-77 at 31, which generally recognizes BellSouth’s right to consent to revisions in the IPP, we also would reference the same Order at 28, which recognizes that although the IPP is a voluntary, self-effectuating penalty plan, the Commission reserves the right to review and make changes to the plan, after consultation with CLEC’s and BellSouth. Such a consultation was done in the present case, even though one party (BellSouth) ultimately disagreed with the result. However, we also agree with AT&T that, taken to the extreme, this would mean that there was no real necessity or purpose for BellSouth to have filed its

Motion for Reconsideration of the Review Order, since BellSouth could just refuse to follow the Review Order. Obviously, this is an absurd result. This Commission must ultimately reserve the right to make final decisions on regulatory matters, especially matters that go to the very core of a regulatory subject. In this case, that subject is the measurement of the payment in the IPP. However, we do hold that the matter of measurement of the IPP payment shall once again be considered at the time of the next six months' review in this Docket. This will allow for more input on the question from other parties to this case, and will allow us to compare and analyze the results of measurement of the IPP payment from the edge of the confidence level with measurement of the payment from the mean. We can consider the results of this comparison at our next review, and again consider which is the best and fairest methodology for all parties.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. This Commission's position on the measurement of the payment in the IPP in Order No. 2004-100 is supported by substantial evidence of record, i.e. the testimony of AT&T witness Robert M. Bell.

2. This Commission's position in Order No. 2004-100 is not arbitrary, but is a reasonable conclusion based upon the evidence. Order No. 2002-77 at 120 contemplated revisiting the question of the measurement of the payment in the IPP. Further, the fact that there was no backsliding by BellSouth during the six-months review period does not dictate that we cannot examine a change in the measurement of the payment under the IPP, nor does it render an actual change in said method arbitrary.

3. Although BellSouth has a right to consent to changes in the IPP, the Commission must reserve to itself the ability to make final decisions on regulatory matters, including the IPP.

4. The Commission reaffirms the measurement of the payment in the IPP from the mean at this time. However, this matter shall be considered once again at the next six months review in this Docket.

5. The next six months period for review shall include data for the six months period beginning March 1, 2004.

**V. ORDER**

The Motion for Reconsideration of BellSouth is hereby denied. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

\_\_\_\_\_/s/\_\_\_\_\_  
Mignon L. Clyburn  
Chairman

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Bruce F. Duke  
Executive Director

(SEAL)